

No. 11-55016

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TARLA MAKAEFF, Individually and on Behalf of All Others Similarly Situated,

Plaintiff-Counter-Defendant-Appellant,

vs.

TRUMP UNIVERSITY, LLC,

Defendant-Counter-Claimant-Appellee.

Appeal from the United States District Court
for the Southern District of California
No. 3:10-cv-00940-IEG(WVG)
The Honorable Irma E. Gonzalez

REQUEST FOR JUDICIAL NOTICE

ROBBINS GELLER RUDMAN
& DOWD LLP
ERIC ALAN ISAACSON (120584)
RACHEL L. JENSEN (211456)
AMANDA M. FRAME (253603)
655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)

ZELDES & HAEGGQUIST, LLP
AMBER L. ECK (177882)
625 Broadway, Suite 906
San Diego, CA 92101
Telephone: 619/342-8000
619/342-7878 (fax)

Attorneys for Plaintiff-Counter-Defendant-Appellant

Plaintiff/Counter-Defendant/Appellant Tarla Makaeff respectfully submits this Request for Judicial Notice (“RJN”).

This appeal arises from denial of a motion to strike under California Code of Civil Procedure §425.16, under which a court “shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.” The United States Supreme Court holds that courts evaluating a pleading properly consider “documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

Thus, articles and web pages that a complaint expressly references are freely noticeable.¹ Exhibits A-D to this RJN are true and correct copies of articles specifically referenced in the operative First Amended Complaint.

Federal courts also may take notice of newspaper and magazine articles even when they are not specifically incorporated by reference in a pleading.² Exhibits E-T

¹ See, e.g., *Daniels-Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998 (9th Cir. 2010) (following *Tellabs* where complaint incorporated by reference documents and web pages that it quoted or cited); *al-Kidd v. Ashcroft*, 580 F.3d 949, 994 n.6 (9th Cir. 2009) (“Because the report, an official government document, is cited extensively throughout the complaint, we deem it incorporated by reference, and take judicial notice of its entire contents.”); *Zucco Partners LLC v. Digimarc Corp.*, 552 F.3d 981, 991 (9th Cir. 2009) (quoting *Tellabs*); *Ronconi v. Larkin*, 253 F.3d 423, 427 (9th Cir. 2001) (finding “SEC filings incorporated by reference in the complaint”); *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 986 (9th Cir. 1991) (same).

to this RJN are true and correct copies of newspaper and magazine articles that were not specifically referenced below, but that are nonetheless judicially noticeable in connection with this Court's *de novo* determination, *see Mindys Cosmetics, Inc. v.*

² See *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010) (taking judicial notice of newspaper and magazine articles as “as an indication of what information was in the public realm at the time”); *Heliotrope Gen. Inc. v. Ford Motor Co.*, 189 F.3d 971, 981 n.18 (9th Cir. 1999) (“We take judicial notice that the market was aware of the information contained in news articles submitted by the defendants.”); *Ritter v. Hughes Aircraft Co.*, 58 F.3d 454, 458-59 (9th Cir. 1995) (judicial notice of articles reporting Southern California layoffs); *accord, e.g., Staehr v. Hartford Fin. Servs. Group*, 547 F.3d 406, 425 (2d Cir. 2008) (“it is proper to take judicial notice of the **fact** that press coverage, prior lawsuits, or regulatory filings contained certain information”) (circuit court’s emphasis); *DeBenedictis v. Merrill Lynch & Co., Inc.*, 492 F.3d 209, 214 (3d Cir. 2007) (taking judicial notice of *USA Today* and *Time Magazine* articles submitted by defendants); *Benak v. Alliance Capital Mgmt. L.P.*, 435 F.3d 396, 401 n.15 (3d Cir. 2006) (judicial notice of newspaper articles “to indicate what was in the public realm at the time, not whether the contents of the articles were in fact true”); *Selkridge v. United of Omaha Life Ins. Co.*, 360 F.3d 155, 162 n.5 (3d Cir. 2004) (“We take judicial notice of the existence of a letter-to-the-editor by Attorney Rohn published in the *St. Croix Source*.”); *LC Capital Partners, L.P. v. Frontier Ins. Group, Inc.*, 318 F.3d 148, 155 (2d Cir. 2003) (judicial notice of press coverage and prior litigation); *Logan v. Denny’s Inc.*, 259 F.3d 558, 577-78 & n.9 (6th Cir. 2001) (judicial notice of press coverage concerning defendant’s “past history of discriminatory conduct”); *Ieradi v. Mylan Lab., Inc.*, 230 F.3d 594, 598 n.2 (3d Cir. 2000) (“We take judicial notice under Federal Rule of Evidence 210(f) of an article in the *New York Times*”); *Peters v. Del. River Port Auth.*, 16 F.3d 1346, 1356-57 & n.14 (3d Cir. 1994) (“We take judicial notice of newspaper accounts highlighting controversies over DRPA’s toll increases, spending practices, and public announcements.”); *Washington Post v. Robinson*, 935 F.2d 282, 291-92 (D.C. Cir. 1991) (“This court may take judicial notice of newspaper articles in the Washington, D.C., area that publicized the ongoing criminal investigation of the *Barry* case, and McWilliams’ involvement and cooperation in that investigation.”); *Cerasani v. Sony Corp.*, 991 F. Supp. 343, 354 n.3 (S.D.N.Y. 1998) (judicial notice of press coverage of a criminal trial).

Dakar, 611 F.3d 590, 595 (9th Cir. 2010), of whether Trump University qualifies as a public figure.³ Though the Court is not ***required*** to consider supplemental material not referenced before the district court, it may do so “in the interest of fairness.” *United States v. Rutgard*, 116 F.3d 1270, 1278 (9th Cir. 1997). Its review after all, is *de novo*, see *Mindys Cosmetics*, 611 F.3d at 595, and “[j]udicial notice may be taken at any stage of the proceeding.” Fed. R. Evid. 201(f); see *United States v. Jones*, 574 F.3d 546, 551 n.2 (8th Cir. 2009); *Hotel Emps. & Rest. Emps. Union, Local 100 v. City of N.Y. Dep’t of Parks and Recreation*, 311 F.3d 534, 540 n.1 (2d Cir. 2002).

This Court also is entitled to judicially notice Donald Trump’s books, including his “collaborations” with Trump University – several of them depicted in the complaint, on the slide “Donald Trump: American Icon / The Educator.”⁴ Excerpts from Donald Trump’s books are attached as Exhibits U-Y to this RJN.

³ See *Dockray v. Phelps Dodge Corp.*, 801 F.2d 1149, 1152 n.3 (9th Cir. 1986) (taking judicial notice of newspaper articles concerning a labor dispute that were not considered by the district court); *Gafoor v. INS*, 231 F.3d 645, 656-57 & n.7 (9th Cir. 2000) (judicially noticing numerous newspaper and magazine articles not considered below concerning unrest in Fiji); *In re Briscoe*, 448 F.3d 201, 221 & n.9 (3d Cir. 2006) (judicial notice of news coverage surrounding diet drugs’ withdrawal from the market).

⁴ ER0267-268(CR10:¶33); see *Flood v. Kuhn*, 407 U.S. 258, 262 n.2 (1972) (taking judicial notice of books about baseball); *Texas & Pac. Ry. Co. v. Pottorff*, 291 U.S. 245, 254 n.4 (1934) (taking judicial notice of the “available treatises or textbooks on banks and banking practice”); *Von Saher*, 592 F.3d at 960 (taking judicial notice of “various newspapers, magazines, and books” offered “as an indication of what

As the following materials are judicially noticeable and may be helpful to the Court, Makaeff respectfully seeks leave to submit them through this RJN:

EXHIBIT DESCRIPTION

- A: David Lazarus, *Trump Spins in Foreclosure Game*, Los Angeles Times, (Dec. 12, 2007), <http://www.latimes.com/business/la-fi-lazarus12dec12,0,7835610.column>.
- B: David Lazarus, *Trump's a Grump About Column on His "Priceless" Tips*, Los Angeles Times (Dec.16, 2007), <http://www.latimes.com/business/la-fi-lazarus16dec16,0,1670633.column>.
- C: Douglas Feiden, *State Educrats Give Failing Grade to Donald Trump's "Misleading" Trump University*, New York Daily News (April 16, 2010), http://articles.nydailynews.com/2010-04-16/news/27061901_1_donald-trump-dunce-cap-trump-university.
- D: Lynn O'Shaughnessy, *Is Trump University Flunking Out?*, CBS Moneywatch (April 19, 2010), <http://moneywatch.bnet.com/spending/blog/college-solution/is-trump-university-flunking-out/1913/>.
- E: Karl Vick, *Team-Building or Torture? Court Will Decide.*, The Washington Post (April 13, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/04/12/AR2008041201739.html>.

information was in the public realm"); accord, e.g., *Garb v. Republic of Poland*, 440 F.3d 579, 594 n.18 (2d Cir. 2006) (judicial notice of book on Polish government "appropriate for judicial notice, which 'may be taken at any stage of the proceeding'" under Fed. R. Evid. 201(f)); *Hotel Emps. & Rest. Emps. Union, Local 100*, 311 F.3d at 540 n.1 (judicially noticing "Edgar B. Young's comprehensive history of the construction of Lincoln Center" though "request[ed] for the first time on appeal"); *United States v. Pozsgai*, 999 F.2d 719, 731 (3d Cir. 1993) (judicial notice by appellate court of two history books not considered below).

- F: Michael Barbaro, *New York Attorney General Is Investigating Trump's For-Profit School*, The New York Times (May 19, 2011), http://www.nytimes.com/2011/05/20/nyregion/trumps-for-profit-school-said-to-be-under-investigation.html?_r=1.
- G: Transcript of *MSNBC Live with Cenk Uygur*, April 20, 2011.
- H: "Fake Consultant," *On Universities and Such, or, if Obama's a Kettle, Is Donald Trump Black?*, Left In Alabama Blog (May 1, 2011), <http://www.leftinalabama.com/diary/8126/on-universities-and-such-or-if-obamas-a-kettle-is-donald-trump-black>.
- I: Carla Marinucci, *Trump Real Estate Courses Didn't Deliver, Suit Says*, San Francisco Chronicle (May 5, 2011), <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2011/05/04/MNER1JB975.DTL>.
- J: Marcus Baram, *Trump "University" Accused of Scamming Customers*, Huffington Post (May 11, 2011), http://www.huffingtonpost.com/2011/05/06/trump-university-scammed-customers_n_858587.html.
- K: Michael Barbaro, *Buying a Trump Property, or So They Thought*, The New York Times (May 12, 2011), <http://www.nytimes.com/2011/05/13/nyregion/feeling-deceived-over-homes-that-were-trump-in-name-only.html>.
- L: Julie Weiner, *Three Hundred People Currently Suing America's Next President, Donald Trump*, Vanity Fair (May 13, 2011), <http://www.vanityfair.com/online/daily/2011/05/three-hundred-people-currently-suing-americas-next-president-donald-trump.html>.
- M: Michael Gormley, *"Trump University" being Investigated by NY AG*, Associated Press (May 19, 2011), http://hosted2.ap.org/APDEFAULT/Article_2011-05-19-Trump%20School%20Probe/id-pb8d790154f2e46b383806d0116b4663a.

- N: Douglas Feiden, *Donald Trump's For-Profit "Trump University" Investigated for Possibly Deceptive Business Practices*, New York Daily News (May 19, 2011), http://articles.nydailynews.com/2011-05-19/local/29579444_1_trump-university-eric-schneiderman-state-investigators.
- O: Maggie Haberman, *Trump University Being Probed*, Politico (May 19, 2011), <http://www.politico.com/news/stories/0511/55334.html>.
- P: Ben Rooney, *Trump's "University" Targeted by NY Regulators*, CNN Money (May 20, 2011), http://money.cnn.com/2011/05/20/news/companies/trump_university/index.htm.
- Q: *New York State Attorney General Is Investigating For-Profit School Founded by Donald Trump*, American School & University (May 20, 2011), <http://asumag.com/dailynews/probe-for-profit-colleges-trump-new-york-attorney-general-20110520/>.
- R: Glynnis MacNicol, *The Attorney General Is Investigating Donald Trump's "University" for Illegal Business Practices*, The Business Insider (May 20, 2011), <http://www.businessinsider.com/donald-trump-university-investigation-2011-5>.
- S: Douglas Feiden, *The Donald Deceptive? Probe Trump School*, New York Daily News (May 20, 2011).
- T: *School's Practices to be Investigated*, The Age (May 21, 2011), <http://www.theage.com.au/world/schools-practices-to-be-investigated-20110520-lewrr.html>.
- U: Donald J. Trump with Meredith McIver, *Trump 101 The Way to Success* vii, xiii-xv, xvii, xix-xx, 26-31 & back matter (2007).
- V: *Trump University Wealth Building 101 Your First 90 Days on the Path to Prosperity* v, ix-xi, xiii-xiv, 3-6 & back matter (Donald J. Trump ed., 2007).
- W: Donald J. Trump with Meredith McIver, *Trump: Never Give Up: How I Turned My Biggest Challenge into Success* xiii-xiv, & back matter 142-143 (2008).
- X: David Lindahl, *Trump University Commercial Real Estate Investing 101 How*

Small Investors Can Get Started and Make It Big v, xvii-xviii, I & back matter (2008).

Y: Gary W. Eldred, PhD, *Trump University Real Estate Building 101 Building Wealth with Real Estate Investments* v, xi & back matter (2d ed. 2009).

DATED: May 26, 2011

Respectfully submitted,

ROBBINS GELLER RUDMAN
& DOWD LLP
ERIC ALAN ISAACSON
RACHEL L. JENSEN
AMANDA M. FRAME

s/ Eric Alan Isaacson

ERIC ALAN ISAACSON

655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)

ZELDES & HAEGGQUIST, LLP
AMBER L. ECK
625 Broadway, Suite 906
San Diego, CA 92101
Telephone: 619/342-8000
619/342-7878 (fax)

Attorneys for Plaintiff-Counter-Defendant-
Appellant

DECLARATION OF SERVICE

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and employed in the City and County of San Diego, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 655 West Broadway, Suite 1900, San Diego, California 92101.

2. I hereby certify that on May 26, 2011, I electronically filed the foregoing document: **REQUEST FOR JUDICIAL NOTICE** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

3. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

I declare under penalty of perjury that the foregoing is true and correct.
Executed on May 26, 2011, at San Diego, California.

s/ Eric Alan Isaacson

ERIC ALAN ISAACSON

Service List

United States District Court for the Southern District of California, No. 10-cv-00940-IEG-WVG;
U.S. Court of Appeals for the Ninth Circuit, No. 11-55016

	ECF Filing Status
Amanda M. Frame Robbins Geller Rudman & Dowd LLP Suite 1900 655 West Broadway San Diego, CA 92101-8498 aframe@rgrdlaw.com Phone: 619/231/1058 619-231-7423 (fax)	Active
Amber Eck Zeldes & Haeggquist, LLP 625 Broadway Suite 906 San Diego, CA 92101 Ambere@zhlaw.com Telephone: 619/342-8000 619/342-7878 (fax)	Active
David Keith Schneider YUNKER & SCHNEIDER Suite 1400 655 W Broadway San Diego, CA 92101 dks@yslaw.com Telephone: 619/233-5500 619/233-5535 (fax)	Active
Eric Alan Isaacson ROBBINS GELLER RUDMAN & DOWD LLP Suite 1900 655 West Broadway San Diego, CA 92101-8498 erici@rgrdlaw.com Phone: 619/231/1058 619-231-7423 (fax)	Active
Rachel L. Jensen Robbins Geller Rudman & Dowd LLP Suite 1900 655 West Broadway San Diego, CA 92101-8498 rachelj@rgrdlaw.com Phone: 619/231/1058 619-231-7423 (fax)	Active